Maxisegar Sdn Bhd v Silver Concept Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–600 OF 1997
HASHIM YUSOFF J
7 MARCH 2001

Contract *— Terms — Implied terms — Failure to obtain loan, whether frustrated contract — Whether contract conditional on approval for loan — Construction of contract*

By an agreement in writing dated 31 March 1997 ('the agreement'), the first defendant agreed to sell and the plaintiff agreed to purchase about 1142.48 acres of land ('the land') in Ulu Selangor for a price of RM217,071,200. The plaintiff had paid an earnest deposit of RM4m and a further deposit of RM17,707,120 to the first defendant. On 21 March 1998, both parties agreed that the other sum of RM20,364,080 plus interest be paid into court as stakeholders money. Therefore, the total sum paid by the plaintiff to date was RM42,071,200. The balance sum of RM175m outstanding according to the plaintiff, was to be paid by the plaintiff after it could obtain a loan. However the plaintiff failed to get the loan from any financial institution. Consequently, the plaintiff wrote to the defendant on 13 December 1997, informing the first defendant that it had failed to raise the loan to enable the plaintiff to complete the purchase of the land. Attempts by the parties to resolve this balance of payment also came to naught. Thereafter, the plaintiff took out a writ action against the defendant seeking, inter alia: (i) a declaration that the agreement between the plaintiff and the first defendant had been frustrated and consequently the plaintiff was discharged from its obligations to perform the agreement; (ii) in consequence thereof for an order that the first defendant refund the total sum of RM42,071,200 together with interest to the plaintiff; and (iii) an injunction against the second defendant restraining the second defendant from parting with the sum of RM20,364,080 held by them as stakeholders until the trial of this action.

Held, dismissing the plaintiff's action with costs:

There was no provision in the agreement to say that the agreement was conditional upon the plaintiff getting a loan in order to perform its obligation under the agreement. The defendant on the other hand was ready, willing and able to perform its part of the agreement. The court could only construe the terms of the agreement as contained in the agreement. The court could not put in terms which had not been agreed upon by the parties (see p 766H–I); *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 followed. When the plaintiff entered into the agreement, it took the risk of hoping to get a loan. When it failed to get the loan then it would have to bear the

consequences of the risk. The land was still available for the plaintiff. The first defendant was still ready and able to sell it to the plaintiff. It was the plaintiff's misfortune that it could not get the loan it hoped for. Therefore, it could not be said that that the contract had been frustrated (see p 767B–C); *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 and *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 followed. The court, therefore, allowed the first defendant's claim for breach of contract by the plaintiff for the forfeiture of the first instalment and a further sum equivalent to 11%pa on the third instalment calculated from the due date until the date of such forfeiture. The amount could be utilized from the stakeholders sum plus interest which was paid into court by way of set off and the amount deposited in court together with all interest therein be released to the first defendant (see pp 767I–768A).

[Bahasa Malaysia summary

Melalui satu perjanjian secara bertulis bertarikh 31 Mac 1997 ('perjanjian tersebut'), defendan pertama bersetuju untuk menjual dan plaintif-plaintif bersetuju untuk membeli lebih kurang 1142.48 ekar tanah ('tanah tersebut') di Ulu Selangor untuk harga RM217,071,200. Plaintif telah membayar satu cengkeram deposit sebanyak RM4j dan satu deposit berikutnya sebanyak RM17,707,120 kepada defendan pertama. Pada 21 Mac 1998, kedua-dua pihak bersetuju agar jumlah lain iaitu RM20,364,080 berserta faedah perlu dibayar ke mahkamah sebagai wang stakeholder. Oleh itu, jumlah keseluruhan yang dibayar oleh plaintif sehingga kini adalah RM42,071,200. Baki jumlah RM175j yang terhutang menurut plaintif perlu dibayar oleh plaintif setelah ia mendapat pinjaman. Namun begitu plaintif gagal mendapat pinjaman daripada mana-mana institusi kewangan. Akibatnya, plaintif telah menulis kepada defendan pada 13 Disember 1997, memaklumkan defendan pertama bahawa ia telah gagal untuk mendapat pinjaman bagi membolehkan plaintif menyelesaikan pembelian tanah tersebut. Percubaan oleh pihak-pihak tersebut untuk menyelesaikan baki pembayaran ini juga tidak berhasil. Oleh demikian, plaintif memulakan writ tindakan terhadap defendan memohon, antara lain: (i) satu deklarasi bahawa perjanjian antara plaintif dan defendan pertama telah dikecewakan dan akibatnya plaintif dibebaskan daripada obligasi-obligasi untuk melaksanakan perjanjian tersebut; (ii) akibat daripada itu satu perintah agar defendan pertama memulangkan kembali jumlah keseluruhan RM42,071,200 berserta faedah kepada plaintif; dan (iii) satu injunksi terhadap defendan kedua menghalang defendan kedua daripada memberikan jumlah RM20,364,080 yang dipegang oleh mereka sebagai stakeholder sehingga perbicaraan tindakan ini.

Diputuskan, menolak tindakan plaintif dengan kos:

Tiada peruntukan dalam perjanjian untuk mengatakan bahawa perjanjian tersebut adalah dengan syarat plaintif mendapat pinjaman bagi melaksanakan obligasinya di bawah perjanjian tersebut. Defendan sebaliknya bersedia, sanggup dan mampu untuk melaksanakan bahagiannya dalam perjanjian tersebut. Mahkamah hanya boleh mentafsirkan terma-terma perjanjian tersebut sebagaimana yang terkandung dalam perjanjian tersebut. Mahkamah tidak boleh memasukkan terma-terma yang tidak dipersetujui oleh pihak-pihak tersebut (lihat ms 766H–I); *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 diikut. Apabila plaintif memasuki perjanjian tersebut, ia telah mengambil risiko untuk mendapatkan suatu pinjaman. Apabila ia gagal untuk mendapat pinjaman tersebut, maka ia harus menerima akibat daripada risiko tersebut. Tanah tersebut masih terbuka untuk plaintif. Defendan pertama masih bersedia dan mampu menjualnya kepada plaintif. Adalah nasib malang plaintif bahawa ia tidak mendapat pinjaman yang diharapkan. Oleh itu, ia tidak boleh dikatakan bahawa kontrak tersebut telah dikecewakan (lihat ms 767B–C); *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 dan *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 diikut. Mahkamah, oleh itu, membenarkan tuntutan defendan pertama untuk perlanggaran kontrak oleh plaintif bagi perlucuthakan bayaran ansuran pertama daripada tarikh yang perlu dibayar sehingga tarikh perlucuthakan tersebut. Jumlah tersebut boleh digunakan daripada jumlah yang dipegang oleh stakeholder berserta faedah yang dibayar ke mahkamah melalui tolakan dan jumlah yang didepositkan ke mahkamah berserta semua faedah diperintah untuk dilepaskan kepada defendan pertama (lihat ms 767I–768A).]

Notes

For cases on implied terms, see 3(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3174–3175 and 3965–4003.

Cases referred to

Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd [1977] 1 WLR 164 (refd)

Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 (refd)

Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164 (refd)

Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257 (refd)

Universal Corp v Five Ways Properties Ltd [1979] 1 All ER 552 (refd)

Joginder Singh (*CT Annathurai* with him) (*Syarikat Joginder Singh*) for the plaintiff.

A *VK Lingam* (*R Thayalan* with him) (*VK Lingam & Co*) for the defendants.

Hashim Yusoff J:. The plaintiff has taken out a writ action against the defendant seeking, inter alia:

B (1) a declaration that the agreement between the plaintiff and the first defendant has been frustrated and consequently the plaintiff is discharged from its obligations to perform the agreement;

(2) in consequence thereof for an order that the first defendant refund the total sum of RM42,071,200 together with interest to the plaintiff; and

C (3) an injunction against the second defendant restraining the second defendant from parting with the sum of RM20,364,080 held by them as stakeholders until the trial of this action

Brief facts

D By an agreement in writing dated 31 March 1997 ('the agreement'), the first defendant agreed to sell and the plaintiff agreed to purchase about 1142.48 acres of land ('the land') in Ulu Selangor for a price of RM217,071,200.

The plaintiff had paid an earnest deposit of RM4m and a further deposit of RM17,707,120 to the first defendant. On 21 March 1998, both E parties agreed that the other sum of RM20,364,080 plus interest be paid into court as stakeholders money. Therefore, the total sum paid by the plaintiff to date is RM42,071,200. The balance sum of RM175m outstanding according to the plaintiff, was to be paid by the plaintiff after it could obtain a loan. But the plaintiff failed to get the loan from any financial institution. Consequently, the plaintiff wrote to the defendant on F 13 December 1997, informing the first defendant that it had failed to raise the said loan to enable the plaintiff to complete the purchase of the land. Attempts by the parties to resolve this balance of payment also came to naught. Thereafter, the plaintiff took out this action for the orders as stated earlier above.

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Submissions

The main ground of the plaintiff's action is that the agreement has been frustrated by reason of its inability to get the said loan due to the economic recession and also Bank Negara Malaysia's ('BNM') circulars restricting the H local financial institutions and banks from giving out loans for purposes as required by the plaintiff. Learned counsel for the plaintiff referred to the case of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at p 729 where Lord Radcliffe said:

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> Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

It was submitted in the instant case, that the intention of the plaintiff in purchasing the land for the purpose of developing the land into a small township and to obtain a loan to complete the purchase was made known to the first defendant. This was even referred to in the agreement vide cl 4.6 which ends with 'the parties hereto hereby agree that the loan shall not be in excess of 80% of the purchase price.'

Due to the worsening economic and financial conditions facing the country, BNM had issued several circulars to the local financial institutions containing restrictions on advances to the property sector. This culminated in the BNM circular dated 16 February 1997, whereby BNM prohibited financial institutions from lending money 'to property projects where construction has not started, including for the construction of low and medium cost residential properties costing RM150,000 and below.' Because of this circular, the plaintiff's main financier, that is, Arab Malaysian Merchant Bank Bhd who had agreed to syndicate a loan for the plaintiff to enable the plaintiff to pay the balance of the purchase price of the land to the first defendant, failed to do so. Therefore, the plaintiff argued that the supervening events by BNM had made the performance of the agreement by the plaintiff impossible or radically different from that contemplated, or frustrated.

The first defendant, however, contends that the plaintiff's inability to get the said loan should not lead to a frustration of the agreement because the subject matter has not changed in character. The first defendant, on the other hand, asks for a specific performance of the agreement or alternatively, damages for breach of contract.

Findings

From the evidence adduced before the court during the trial, it is clear that the plaintiff intended to get a loan in order to pay off the balance sum. But unfortunately for the plaintiff, the economic recession had set in at that material time. This together with BNM's circulars which were not in the plaintiff's favour, led to the plaintiff's inability to secure the requisite loan to enable it to complete the purchase of the land. In the case of *Universal Corp v Five Ways Properties Ltd* [1979] 1 All ER 552, the Court of Appeal in referring to the doctrine of frustration said at p 554 as follows:

> The judge dealt with the topic of frustration quite shortly. He said:
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> > 'But quite emphatically the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.'
>
> That seems to me to be an accurate and proper statement …

However, there is no provision in the agreement to say that the agreement is conditional upon the plaintiff getting a loan in order to perform its obligation under the agreement. The defendant on the other hand is ready, willing and able to perform its part of the agreement. The court can only construe the terms of the agreement as contained in the agreement. The court cannot put in terms which have not been agreed upon by the parties.

Hashim Yeop Sani CJ (Malaya) in the case of *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 at p 165 said:

> Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it.

When the plaintiff entered into this agreement, it took the risk of hoping to get a loan. When it failed to get the said loan then it would have to bear the consequences of the risk. In the case of *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164, Buckley LJ at p 173 stated:

> But, in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that may result from the maturing of that risk is a loss which must lie where it falls.

The land is still available for the plaintiff. The first defendant is still ready and able to sell it to the plaintiff. It is the plaintiff's misfortune that it could not get the loan it hoped for. In *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257, the Supreme Court held at p 262 as follows:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

For the above reasons, it cannot be said that that the contract has been frustrated. As such, the plaintiff's action is dismissed with costs.

As to the first defendant's counterclaim, an order for specific performance may not be just in view of the plaintiff's inability to pay the balance.

Regarding damages for breach of the agreement:

Clause 10.1 of the agreement provides that in the event of any breach by the purchaser of any provisions of the agreement, the vendor, that is, the first defendant shall be entitled to:

(1) forfeit the first instalment; and

(2) the sum equivalent to 11%pa on the third instalment or portion thereof remaining unpaid/outstanding, calculated from the due date until the date of forfeiture by way of agreed liquidated damages.

Under the agreement:

The first instalment paid was RM21,707,120.

The third instalment due was RM130,242,720.

I would, therefore, allow the first defendant's claim for breach of contract by the plaintiff for the forfeiture of the first instalment and a further sum equivalent to 11%pa on the third instalment of RM130,242,720

calculated from the due date 30 September 1997 until the date of such forfeiture, that is today. This amount can be utilized from the stakeholders sum plus interest (of RM21,954,318.45) which was paid into court by way of set off and the amount deposited in court together with all interest therein be released to the first defendant.

Plaintiff's action dismissed with costs.

Reported by Ezatul Zuria Azhari